

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED

January 11, 2011

In the Matter of S. S. EBEL, Minor.

No. 299523

Ingham Circuit Court

Family Division

LC No. 09-001205-NA

Before: HOEKSTRA, P.J., and CAVANAGH and BORRELLO, JJ.

PER CURIAM.

Respondent appeals as of right from a circuit court order terminating his parental rights to the minor child pursuant to MCL 712A.19b(3)(c)(i), (g), (j), and (m). We reverse and remand.

Respondent, who was incarcerated in Florida at the time of the termination hearing, argues that the trial court's refusal to allow him to participate in the termination hearing after allowing his attorney to withdraw violated his due process rights. We agree.

"[P]arents have a significant interest in the companionship, care, custody, and management of their children. This interest has been characterized as an element of 'liberty' to be protected by due process." *In re Brock*, 442 Mich 101, 109; 499 NW2d 752 (1993). "Due process in civil cases generally requires notice of the nature of the proceedings, and an opportunity to be heard in a meaningful time and manner, and an impartial decisionmaker." *In re Juvenile Commitment Costs*, 240 Mich App 420, 440; 613 NW2d 348 (2000). If a respondent is incarcerated, the court may allow him to attend the proceedings through electronic means, such as use of a speaker phone. MCR 3.923(E).¹ The court's failure to secure an incarcerated parent's presence at a child protective proceeding may constitute a denial of due process. *In re Vasquez*, 199 Mich App 44, 49-50; 501 NW2d 231 (1993). To determine whether a respondent has been denied his constitutional due process right to be present at a termination hearing, courts apply the three-factor balancing test set forth in *Mathews v Eldridge*, 424 US 319; 96 S Ct 893; 47 L Ed 2d 18 (1976). *In re Vasquez*, 199 Mich App at 46-47. Those factors are as follows:

¹ Although MCR 2.004 requires a trial court to secure an incarcerated parent's presence by telephone, that rule only applies to a parent incarcerated with the Michigan Department of Corrections, not to a parent incarcerated in another state. *In re BAD*, 264 Mich App 66, 74-76; 690 NW2d 287 (2004).

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and [third], the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [*Mathews*, 424 US at 335.]

Respondent's interest in his parental rights was a compelling one, *In re Vasquez*, 199 Mich App at 48, and weighs in favor of allowing him to participate. There was also a strong possibility of the erroneous deprivation of those rights because petitioner's witness provided only minimal testimony that went untested through cross-examination. Further, she testified only to an "apparent" substance abuse problem, lacked specific information about respondent's relationship with the child, and had no information regarding respondent's incarceration and when he might be released. Finally, the burden of allowing respondent to participate by telephone was minimal. Respondent had asked to participate in the case by telephone, but the trial court refused because respondent had an outstanding warrant against him. Although respondent did not specifically request to participate in the termination hearing, the trial court's statement on the original hearing date indicates that it would not have honored such a request. The court stated, "It's the Court policy not to allow folks who have bench warrants to participate in proceedings by way of teleconference." Regardless of the correctness of the court's determination not to afford respondent the right to participate by telephone while he was able to travel to Michigan but chose not to do so to avoid arrest on an outstanding warrant, the purpose of the policy was not served once respondent was incarcerated and unable to travel to Michigan. Further, the trial court also allowed respondent's counsel to withdraw, thereby leaving respondent's interests unrepresented at the hearing. Under the circumstances, respondent's due process rights were violated.

Reversed and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra

/s/ Mark J. Cavanagh

/s/ Stephen L. Borrello